April 18, 2020

CALIFORNIA DEPARTMENT OF SOCIAL SERVICES

EXECUTIVE SUMMARY

ALL COUNTY LETTER NO. 20-38

The purpose of this letter is to provide a general overview to county child welfare services agencies and county probation departments of certain provisions passed under Assembly Bill (AB) 3176 (Chapter 833, Statutes of 2018), effective January 1, 2019. This bill amended 32 sections of the Welfare and Institutions Code. This letter does not address every part of the changes made by AB 3176 and is not intended to be a comprehensive guide. The purpose of this letter is to highlight the significant amendments passed by AB 3176.

STATE OF CALIFORNIA—HEALTH AND HUMAN SERVICES AGENCY
DEPARTMENT OF SOCIAL SERVICES
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April 18, 2020

ALL COUNTY LETTER NO. 20-38

TO: ALL COUNTY CHILD WELFARE DIRECTORS
ALL COUNTY PROBATION OFFICERS
ALL COUNTY BOARDS OF SUPERVISORS
ALL CHIEF PROBATION OFFICERS
ALL TITLE IV-E AGREEMENT TRIBES
ALL FEDERALLY RECOGNIZED TRIBES

SUBJECT: CHILDREN AND FAMILY SERVICES DIVISION: IMPLEMENTATION OF ASSEMBLY BILL 3176 REGARDING INDIAN CHILDREN (CHAPTER 833, STATUTES OF 2018)

REFERENCE: TITLE 25 UNITED STATES CODE (USC) CHAPTER 21, 1903(4), 25 USC 1912(d); TITLE 25 CODE OF FEDERAL REGULATIONS (CFR) PART 23; 84 FEDERAL REGISTER (FR) 20387; ASSEMBLY BILL (AB) 3176; WELFARE AND INSTITUTIONS CODE (WIC) SECTIONS 212.5, 224.1, 224.1(f), 224.2(a), 224.2(d), 224.3, 224.3(a)(5), 224.3(g), 224.6, 292, 293, 295, 297, 300, 306, 306(d), 306(e), 319, 319.4, 352(b), 354, 361.31, 16507.4, AND 16507.4(b); ALL COUNTY LETTER (ACL) NO. 16-84 MENTAL HEALTH SUBSTANCE USE DISORDER SERVICES (MHSUDS) INFORMATION NOTICE (IN) NO. 16-049; ACL NO. 18-09/MHSUDS IN NO. 18-007; ACL NO. 18-23; ACL NO. 18-81; ACL NO. 18-140; ALL COUNTY INFORMATION NOTICE (ACIN) NO. I-21-18 MHSUDS IN NO. 18-022; CHILD WELFARE SERVICES MANUAL OF POLICIES AND PROCEDURES (MPP) DIVISION 31 REGULATIONS SECTION 31-105.114(a-e)

The purpose of this All County Letter (ACL) is to provide an overview to county child welfare services (CWS) agencies and county probation departments of certain provisions passed under AB 3176 (Chapter 833, Statutes of 2018), effective January 1, 2019. AB 3176 is intended to conform state law with the 2016 Federal Bureau of Indian Affairs (BIA) regulations governing the Indian Child Welfare Act (ICWA). This bill amended 32 sections of the California Welfare and Institutions Code (WIC). This letter

does not address every aspect of the changes made by AB 3176 and is **not** intended to be a comprehensive guide. The purpose of this letter is to highlight the significant amendments made by AB 3176. The California Department of Social Services (CDSS) will release further guidance to provide additional details for implementing AB 3176.

BACKGROUND

The ICWA was enacted to establish minimum federal standards for the removal of Indian children from their families and the placement of such children in foster and adoptive homes that reflect the unique values of Indian culture. Historically, states have struggled with its implementation, which has resulted in inconsistent practices across the country. In 2016, the BIA adopted regulations to clarify minimum federal standards in order to promote a more uniform and compliant application of the ICWA. AB 3176 was enacted to update and conform the WIC to the BIA federal regulations. This ACL will address some of the major amendments.

ICWA AND THE INTEGRATED CORE PRACTICE MODEL

In 2018, the state's Integrated Core Practice Model (ICPM) for Children, Youth, and Families[1] was significantly enhanced, establishing evidence-informed guidance and principle-based practices around effective engagement, assessment, service planning and delivery, monitoring of care, and transition management. The ICPM has particular use in supporting voice and choice, sharing of decision-making power, and establishing authentic cultural humility as a central tenet of intervention. Communicating with a family in a way that supports a discussion of the family's culture is an important casework component of California's ICPM and facilitates natural inquiry into the family's tribal affiliation during the process of engagement. Inquiry should be made with the child as well as any parent, Indian custodian, and extended family contacted in the course of an investigation. The ICPM will inform the guidance put forth in future letters that will more thoroughly address the areas outlined in this letter.

DOCUMENTATION OF ONGOING INQUIRY AND ACTIVE EFFORTS

During the intake and investigation process, timely documentation is critical to demonstrate thorough inquiry and the provision of active efforts. Hotline inquiries with reporting parties regarding tribal affiliation must be documented in the Screener Narrative and/or the emergency response referral. Successful and attempted contacts with tribal representatives or designated ICWA agents should be documented in the case record and include as much detail as possible. Documenting activities that enable a child to remain in the home during investigations (safety planning, community service

[1] ACIN NO. I-21-18/MHSUDS IN NO. 18-022

referrals, informal and formal teaming) is an essential component of active efforts. (See the "Active Efforts" section below for further information.) Counties may find it beneficial to develop guidance to ensure that ICWA inquiry, active efforts, and ICWA notice (if applicable) are consistently documented in a specific location or form. CDSS will release further guidance addressing entry of this information in the Child Welfare Services/Case Management System (CWS/CMS).

DUTY OF INQUIRY BEGINNING AT INTAKE AND INVESTIGATIONS

Pursuant to WIC § 224.2(a), the duty to inquire in *all* referrals begins at first contact and must occur regardless of the likelihood of court intervention. If thorough inquiry to identify an Indian child is not conducted prior to the involvement of the juvenile court, it is unlikely that CWS agencies will be able to meet the ICWA requirements such as making active efforts to provide "remedial services and rehabilitative programs designed to prevent the breakup of the Indian family." (25 USC §1912(d))

Communication with tribes regarding reports of abuse and neglect involving a child where there is reason to believe that the child may be an Indian child is a critical component of the inquiry process. When a referral is received at the Hotline alleging a child has been the victim of abuse, neglect, or exploitation, the Hotline social worker shall ask the reporting party whether they have any information that the child is or may be an Indian child, which is defined as a child who is either (1) a member of an Indian tribe, or (2) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. (25 U.S.C. § 1903(4)) If a child's affiliation with a specific tribe is reported to the Hotline at the point of intake, that tribe's designated tribal agent for ICWA notice, as published annually in the Federal Register, should be contacted for further inquiry. The date, time, and result of communication with the tribe should be documented. For more information on the documentation requirements regarding collateral contacts at the Hotline, please refer to the CWS MPP Section 31-105.114(a-e).

Any time a referral is assigned to a CWS field office for investigation, the investigating social worker has an affirmative and ongoing duty to inquire whether a child may be an Indian child. A response in the negative at the time of Hotline screening is *not* a sufficient basis to cease inquiry, as the reporting party may have limited information regarding the child's membership (or potential membership) with a tribe.

REASON TO BELIEVE AND CONTINUED INQUIRY WITH TRIBES

The term "reason to believe" refers to the threshold for continued inquiry regarding a child's potential membership with a tribe. If a child, a parent, an extended family member, or a collateral contact identifies the family's potential affiliation with any tribe,

there is reason to believe the child may be an Indian child and communication for the purpose of further inquiry should commence. This communication should occur regardless of the likelihood that CWS will seek court intervention or remain involved with the family. Federally recognized tribes should be treated as any other governmental organization with whom confidential information should be shared as early as possible regarding the investigation of child abuse and neglect. ACL No. 18-140 provides more detail about information-sharing with tribes.

For inquiry purposes, communication with tribes may be informal (telephone calls, email, etc.) but must be thoroughly documented in the case record. Notice, in contrast, requires a specific method and process for communication, as outlined below. Prior to contacting a tribe, social workers should gather as much identifying information as possible regarding the child's biological family members (including absent parents) who are believed to have affiliation with a tribe. This includes full names and dates of birth, tribal enrollment numbers/certifications, Degree of Indian Blood and/or Certificates of Indian Blood, and tribal identification cards.

At first contact with a tribe, CWS social workers should state the purpose of the call (to determine whether the child is a member of the tribe or eligible for membership) and the purpose of the CWS agency's involvement (investigating a referral, assigning a referral to a field office, etc.) and clarify whether juvenile court involvement has occurred or is likely to occur. A sample inquiry script is outlined below:

"My name is _____, and I am a social worker with [Name of county welfare agency]. I was recently assigned a child abuse/neglect investigation. This is an initial investigation only. No removal of the child has occurred and the CWS agency has not made any decision regarding pursuing court involvement. During my initial contact with the family, the mother reported that her child may be eligible for membership with your tribe through their father's side of the family. I am hopeful of connecting this youth to his/her community and/or available tribal resources, and we have an obligation to inquire directly with the tribe to attempt to confirm the child's Indian status and the child's tribe. Can you assist me with this or identify the appropriate tribal contact? The child's mother was not aware of any enrollment numbers and has no information regarding extended paternal family. The child's biological father is reported to be (FULL NAME/ALIASES) and his date of birth is MM/DD/YYYY. The child's name is (FULL NAME) and their date of birth is MM/DD/YYYY

This proactive method of inquiry is the first step in the process of active efforts, and of creating or deepening the natural supports which are critical to maintaining independence and supporting any needed interventions. This inquiry should be accurately reflected in the case records. If the tribe responds affirmatively, it is critical

that the social worker immediately inquire as to whether the tribe exercises exclusive jurisdiction over child welfare matters or whether the particular child is a ward of a tribal court (see "Exclusive Jurisdiction" below for further information). Thorough documentation of the tribe's determination includes the date and time the information was received by the CWS social worker and the full name and contact information for the tribal representative who provided the information. If the tribe determines that the child is a member or eligible for membership, ongoing communication with the tribe during the investigation (and any subsequent CWS involvement) is required. This would extend to the child and family teaming processes and meetings that may later be required.

INQUIRY THROUGHOUT JUVENILE COURT INVOLVEMENT

Inquiry about a child's status can furnish information providing "reason to know" or "reason to believe" that a child is or may be an Indian child. These are distinct legal terms that require different responses. While "reason to believe" requires further *inquiry*, "reason to know" requires formal *notice* and application of ICWA minimum standards as described below.

The court, CWS agencies, and the probation department have an affirmative and ongoing duty in all cases to inquire whether a child for whom a petition may be or has been filed, is or may be an Indian child. That duty includes asking questions of all of the participants in the case, including, but not limited to, the party reporting abuse or neglect, the child, the parents, the legal guardian, the Indian custodian, extended family members, and any others who may have an interest in the child as to whether the child is or may be an Indian child. This also includes asking where the child, parents, or Indian custodian reside, or are domiciled. The court shall ask each participant at their first appearance whether the participant knows or has reason to know that the child is an Indian child and instruct the participants to provide to the social worker and the court any subsequently received information that provides such reason to know.

If information produced during the child custody proceeding is insufficient to give reason to know but does give **reason to believe** that the child is an Indian child, the social worker or probation officer shall make further inquiry. Further inquiry includes, but is not limited to, interviewing those who have an interest in the child—including the Indian custodian, the parents, extended family members, and legal guardians—to gather the information required under WIC § 224.3(a)(5), contacting the BIA and the CDSS to gather contact information for tribes, and contacting the tribes that the child is or may be a member of.

When contacting the CDSS to assist in identifying the contact for a tribe(s) in which a child, parent, or Indian custodian may be or is a member of, please send inquiries to ICWAinquiry@dss.ca.gov.

REASON TO KNOW

Although AB 3176 describes reason to know in the specific context of the court, it also provides the standards that apply to the social worker prior to and in preparation for court proceedings. There is "reason to know" that the child is an Indian child under the Act when:

- A person having an interest in the child informs the court that the child is an Indian child.
- The child, their parents, or Indian custodian is domiciled on a reservation.
- A participant in the proceeding or other interested person informs the court that they have information indicating that the child is an Indian child.
- The child gives the court reason to know they are an Indian child.
- The court is informed that the child is or has been a ward of a tribal court.
- The court is informed that either parent or the child possesses an identification card indicating membership or citizenship in an Indian tribe.

If there is "reason to know" as defined above, the party seeking foster care for the child shall provide notice in accordance with WIC § 224.3(a)(5). If the court has "reason to know" but does not have sufficient evidence to determine that the child is or is not an Indian child, the court shall confirm, by way of a report, declaration, or testimony included in the record, that the agency or other party used due diligence to identify and work with all of the tribe(s) in which there is a "reason to know" the child may be a member of, or eligible for membership with, to verify that the child is in fact a member or eligible for membership and has a biological parent who is a member of a tribe.

If there is "reason to know" that the child is or may be an Indian child, the court shall treat the child as an Indian child unless and until the court determines on the record that the child does not meet the definition of an Indian child under the ICWA.

ICWA NOTICE

The 2016 ICWA regulations updated ICWA notice requirements to include only designated "Indian child custody proceedings"; that is, hearings that could result in foster care, termination of parental rights, or the adoption of an Indian child. The ICWA Notice refers to the formal process by which tribes are notified of a dependency proceeding (by certified or registered mail) involving an Indian child. As provided by WIC 224.3 , if a court, social worker, or probation officer knows or has reason to know

that an Indian child is involved (as provided by WIC § 224.2(d)), the following notice requirements apply:

- Notice of any hearing that may result in an order for foster care placement, pre-adoptive placement, termination of parental rights, or adoptive placement must be provided.
- The notice shall be provided to the parents or legal guardian, Indian custodian, and the tribes in which the child is or may be a member or eligible for membership, and shall contain all of the elements required under WIC § 224.3.
- The notice shall be sent by registered or certified mail with a return receipt requested. The proof of notice, including all copies of the notices sent and the return receipts and responses received, shall be filed with the court prior to the hearing.
- No proceeding shall be held until at least 10 days after the receipt of notice by the parent, Indian custodian, tribe, or the BIA, except that in the case of a hearing held pursuant to WIC § 319, notice of the hearing shall be provided as soon as possible after the filing of the petition to declare the Indian child a dependent child.

WIC § 224.3(g) now specifies the following: For any hearing that does not meet the definition of an Indian child custody proceeding set forth in WIC § 224.1, or is not an emergency proceeding, notice to the child's parents, Indian custodian, and tribe shall be sent in accordance with WIC §§ 292, 293, and 295.

For situations involving Indian children that fall under WIC § 300, if additional information or circumstances are discovered other than what was in the original petition, a subsequent petition shall be filed and noticed. Notice for this hearing may be delivered by electronic service with the consent of all parties and the permission of the county and the court pursuant to WIC § 212.5. Counties shall follow the guidelines in accordance with WIC § 297 when filing a subsequent petition.

VOLUNTARY PROCEEDING

WIC § 224.1(q) defines a voluntary proceeding as one in which "either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a state agency, consented to" placing the child in an out-of-home placement or termination of parental rights. Additionally, the parent, parents or Indian custodian must have the ability to regain custody upon demand. WIC § 224.1(p) clarifies that "upon demand" means that "in the case of an Indian child, the parent or Indian custodian may regain physical custody during a voluntary proceeding simply upon verbal request, without any delay, formalities, or contingencies." Any action by the agency that restricts access between the Indian child and their parent, such as a safety

plan or a Voluntary Placement Agreement, is not considered "voluntary." A voluntary proceeding must be presented in court and the following requirements must be met (for any parent or custodian of an Indian Child):

1. Consent must be in writing and recorded before a judge.
2. The presiding judge must certify that the terms and consequences were fully explained in detail and were fully understood in English, or that it was interpreted into a language that was understood.
3. The placement must comply with the placement preferences set forth in WIC § 361.31.
4. Consent given before or within ten (10) days after birth of the Indian child shall not be valid.

The CDSS encourages CWS agencies, social workers, and probation officers to consult with their Counsel when considering if a case is voluntary or involuntary. Further guidance from CDSS on voluntary proceedings and voluntary placements for Indian children pursuant to WIC § 16507.4 will be forthcoming.

ACTIVE EFFORTS

"Active efforts," in the case of an Indian child, means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. It is critical for CWS agencies to understand that active efforts begin at first contact, when an allegation of child abuse or neglect is received at the Hotline. Active communication, coordination, and engagement of tribes via the tribal representative is required at the earliest point in the child welfare referral or investigation regardless of the likelihood of court intervention. Tribal engagement must be taking place **prior to removal** in order to prevent the breakup of the Indian family. It is during these active efforts when professional practice behaviors described in the ICPM are most needed, and staff and supervisors are encouraged to reorient themselves often to the ICPM's practice behaviors in the execution of active efforts.

County CWS agencies must tailor active efforts to the facts and circumstances of every Indian child, which may change depending on the stage of the child welfare referral, investigation, or case. Collaborating with tribal leadership, tribal elders, the Indian child's parents, extended family members, Indian custodians, or other tribal members must occur when social workers or probation officers are determining what the appropriate prevailing social and cultural conditions of the Indian child's tribe are. Furthermore, tribal recommendations regarding specific services or additional assessments for the Indian family must be sought out and provided if possible, rather than relying on the CWS agency's standard or contracted providers. For additional examples of what may constitute active efforts, please see WIC § 224.1(f).

EMERGENCY REMOVAL

If it is known, or there is reason to know, that the child in a detention hearing is an Indian child, federal emergency proceeding requirements mandate that the court must find the Indian child at risk of imminent physical damage or harm in order to detain, or continue to detain, the child. This is in addition to the other requirements for detention. AB 3176 added WIC § 319(i), which provides that in the case of an Indian child, any order detaining the child at the initial petition hearing constitutes an emergency removal. Per WIC 319.4, at or after the initial petition hearing but prior to the disposition, any party may request an ex-parte hearing for the purposes of having the Indian child returned to the parents.

WIC § 352(b) **requires the dispositional hearing to be held within 30 days for an Indian child** (as opposed to 60 days for a non-Indian child), unless the court finds exceptional circumstances to support a continuance. Consistent with the ICPM, CWS and probation agencies must have a Child and Family Team[2] (CFT) meeting and complete the Child and Adolescent Needs and Strengths[3] (CANS) assessment tool to inform the case plan. Thus, in the case of an Indian child, a CFT and the CANS assessment must also be completed in 30 days rather than 60 days. CWS agencies are also reminded that, in the case of an Indian child, an Indian custodian as well as a representative of the child's tribe are required members of the CFT. Active efforts requirements under the ICWA require involvement of the child's tribe at the earliest opportunity.

PLACEMENT PREFERENCES

If it is known or there is reason to know the child is an Indian child, the agency must apply ICWA placement preferences as early as the initial removal. Whether a placement complies with the placement preferences must be analyzed each time there is a change in the child's placement. Pursuant to WIC § 361.31, deviating from the placement preferences requires a showing of good cause, and the party seeking to deviate has the burden of making that showing. Departure from the placement preferences may not be based solely on the socioeconomic status of any relative or based solely on ordinary bonding or attachment. AB 3176 requires the court to make a record in writing and determine good cause based on one or more of the following considerations:

- The request of the Indian child's parent(s), if they attest that they reviewed the placement options

[2] ACL NO. 16-84/MHSUDS IN NO. 16-049, ACL NO. 18-23
[3] ACL NO. 18-09/MHSUDS IN NO. 18-007, ACL NO. 18-81

- The request of the child, if the child is old enough and has the capacity to understand the decision being made
- The placement is the only way to maintain a sibling relationship
- The Indian child requires specialized treatment services that are unavailable, or has an extraordinary need that cannot be met, by conforming to the placement preferences
- A suitable placement was unavailable despite a diligent search, as confirmed by the court.

Under WIC § 16507.4(b)(3), the placement preferences must also be considered in a voluntary placement.

EXCLUSIVE JURISDICTION

It is the duty of the CWS agency and probation department to inquire as to whether a child may already be a ward of a tribal court or if an Indian tribe has exclusive jurisdiction over a child custody proceeding. This begins at first contact or during the inquiry process. Please refer to the "Duty of Inquiry Beginning at Intake and Investigations" section of this letter to follow the requirements for communication with tribes at the inquiry stage.

Prior to the enactment of AB 3176, when a tribe had exclusive jurisdiction over an Indian child and the Indian child was found to be in state court proceedings, a judge would commence the transfer of the proceedings. This process presumed authority by the state court over an Indian child in which the state court did not have jurisdiction to begin with. The amendments made by AB 3176 at WIC § 306 clarify the process for expeditious dismissal in cases where tribes have exclusive jurisdiction.

Pursuant to WIC § 306(d), if a county social worker takes into or maintains an Indian child in temporary custody and the worker knows or has reason to believe the child is already a ward of a tribal court, or resides or is domiciled within a reservation of an Indian tribe that has exclusive jurisdiction over child custody, the CWS agency shall notify the tribe no later than the next working day that the child was taken into temporary custody. The CWS agency must also provide all relevant documentation to the tribe regarding the temporary custody and the child's identity. If the tribe determines that the child is an Indian child who is already a ward of a tribal court or who is subject to the tribe's exclusive jurisdiction, the CWS agency shall transfer custody of the child to the tribe within 24 hours of learning of the tribe's determination.

Pursuant to WIC § 306(e), if a social worker is unable to confirm that an Indian child is a ward of a tribal court and is unable to transfer custody of the Indian child to the tribe, the CWS agency must file the petition within 48 hours. In the report, the CWS agency must inform the court that the Indian child may be a ward of a tribal court or subject to the

exclusive jurisdiction of the child's tribe. Additionally, if the CWS agency receives confirmation that an Indian child is a ward of a tribal court or subject to the exclusive jurisdiction of the Indian child's tribe between the time of filing a petition and the initial petition hearing, the CWS agency must inform the court, provide a copy of the written confirmation, if any, and move to dismiss the petition.

QUALIFIED EXPERT WITNESS

Pursuant to WIC § 224.6(b), the Qualified Expert Witness (QEW) must provide testimony regarding both the social and cultural standards of the Indian child's tribe **and** whether or not continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The CDSS encourages CWS agencies to seek a QEW early in the child welfare process. Failure to obtain a QEW prior to the dispositional hearing is not cause for a continuance, pursuant to WIC § 354. The court may still continue to accept a declaration or affidavit from a QEW in lieu of testimony, but only if the parties have knowingly, intelligently, and voluntarily so stipulated in writing, and the court is satisfied with the stipulation.

CONCLUSION

As previously noted, this letter does not address every aspect of the changes made by AB 3176 nor the current BIA ICWA Regulations, 25 CFR 23, released in 2016. Rather, the purpose of this letter is to highlight some of the significant amendments made by AB 3176 that became effective on January 1, 2019. The CDSS remains dedicated to its continued collaboration with tribes and the enhancement of CWS agency practices to improve consistency as well as to improve outcomes for Indian children and families.

If you have any questions about this letter, please email the Child Welfare Policy and Program Development Bureau at ChildProtection@dss.ca.gov. For any questions related to tribal affairs, please email the Office of Tribal Affairs at TribalAffairs@dss.ca.gov.

Sincerely,

GREGORY E. ROSE
Deputy Director
Children and Family Services Division

c: County Welfare Directors Association (CWDA)
Chief Probation Officers of California (CPOC)